Olathe Healthcare Center, Inc. *and* Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local No. 2. Cases 17–CA–16148 and 17–RC–10769

June 20, 1994

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On June 1, 1993, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. We agree with the judge, essentially for the reasons he set forth, that the warning notice issued to employee Dawn Birdsong on March 17, 1993,[2] violated Section 8(a)(3) and (1) of the Act. We find that the General Counsel has proved elements of a prima facie case—protected activity, knowledge, and animus—and that the timing of the warning makes his case a particularly strong one. Thus, the record shows that Birdsong, together with other employees and a union representative, handed out authorization cards and other union literature at the parking lot entrance in front of the Respondent's facility on March 17. Birdsong and her colleagues were in plain view of anyone looking out the windows of the Respondent's facility. The judge discredited Administrator Sandra Rekstad's testimony that she did not know the identities of the employees who openly engaged in that solicitation and distribution on March 17. The judge found, and we agree, that the evidence warranted the inference that the Respondent knew about Birdsong's union activities. The Respondent demonstrated union animus by posting, on that same day, an unlawfully broad no-distribution rule which supplemented the unlawfully broad no-solicitation rule in the employee handbook. Finally, barely 2 hours after Birdsong had openly engaged in union activity in the parking lot, the Respondent gave her a disciplinary warning for two alleged incidents of resident abuse or neglect. One of the incidents was alleged to have occurred 12 days earlier, on March 5. The Respondent gave no legitimate reason for the delay in warning Birdsong about that incident. This evidence warrants an inference that Birdsong's union activities were a motivating factor in the Respondent's decision to issue her the disciplinary warning.[3]

We also find that the Respondent failed to meet its burden of showing that it would have issued Birdsong the warning notice in the absence of her union activities. The judge credited Birdsong's denial that she engaged in the incidents of resident abuse or neglect as alleged in the disciplinary warning. Further, in rejecting the Respondent's argument that it disciplined Birdsong based on a good-faith belief that she had engaged in misconduct, the judge found that the Respondent presented no competent, credible evidence that Birdsong had engaged in resident abuse or neglect. The Respondent relied on the testimony of Administrator Sandra Rekstad who reported on her dealings with Director of Nursing Debbie Greenley. Greenley allegedly investigated complaints from certain sources and, according to Rekstad, had claimed that Birdsong was responsible for the misconduct. The Respondent did not call any witnesses who could testify directly about Birdsong's involvement in the incidents, and did not even call Greenley, the supervisor who had supposedly investigated the matter first-hand and, according to Rekstad, had actually drafted the warning notice. Neither before us nor before the judge has the Respondent explained why it failed to call Greenley. The judge concluded—and so do we—that the Respondent had failed to show even a good-faith belief that Birdsong had engaged in abuse or neglect of residents. Thus, we agree with the judge's finding that Birdsong was disciplined for her union activity in violation of Section 8(a)(3).

2. We also agree with the judge that the Respondent's issuance of a disciplinary notice to Birdsong constituted a violation of Section 8(a)(1) of the Act as enforcement of the Respondent's unlawfully broad no-solicitation and no-distribution rules. We have found that Birdsong was disciplined solely for her union activity. The only union activity at issue was Birdsong's solicitation of authorization cards and distribution of union literature to her fellow employees at the entrance to the parking lot of the Respondent's facility. Although the warning letter made no overt reference to the Respondent's rules, we find that Birdsong was in effect disciplined for her solicitation and distribution in violation of the Respondent's rules. The Respondent thus

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1993 unless otherwise indicated.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

enforced its unlawfully broad no-solicitation and no-distribution rules in violation of the Act.

[Direction of Second Election omitted from publication.]

Richard C. Auslander, Esq., for the General Counsel.
Jerry Kronenberg, Esq., of Chicago, Illinois, for the Respondent.
Barbara Gumbel, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me on November 12, 1992,[1] in Mission, Kansas. On May 6 the charge in Case 17–CA–16148 was filed by Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local No. 2 (the Union), alleging that Olathe Healthcare Center, Inc. (the Respondent), had committed unfair labor practices in violation of the Act. On June 30, on the basis of the charge, the General Counsel issued a complaint alleging violations of Section 8(a)(1) and (3) of the Act by Respondent. Respondent duly filed an answer admitting jurisdiction of this matter before the Board and the status of certain supervisors under Section 2(11) of the Act, but denying the commission of any unfair labor practices.

Also, on March 18 the Union filed the petition for election in Case 17–RC–10769. On April 21 the Regional Director approved a Stipulated Election Agreement providing for an election among Respondent's certified nursing assistants, nurses aides, dietary employees, housekeeping employees, and maintenance employees, but excluding licensed practical nurses, registered nurses, department heads, and guards and supervisors as defined in the Act. On May 5 the Regional Director conducted an election among the employees in that unit. The tally of ballots showed that, of approximately 103 eligible voters, 23 cast ballots for representation by petitioner and 33 cast ballots against. (There was one void ballot, and no ballots were challenged.) On May 8 the Union filed timely objections to conduct affecting the results of the election. Certain portions of the objections to the election were withdrawn by the Union or dismissed by the Regional Director after investigation. The remaining objections concern a disciplinary warning notice to employee Dawn Birdsong, the use of an alleged supervisory employee as an election observer, and promulgation, maintenance, and enforcement of disciplinary no-solicitation and no-distribution rules. The warning notice to Birdsong and the alleged promulgation, maintenance, and enforcement of the disciplinary rules are also the subject of the unfair labor practice charges and complaint mentioned above. On July 17 the Regional Director issued an order consolidating the representation and complaint cases and for hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs that have been filed by the parties, I make the following

[1] All dates are in 1992 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a Kansas corporation that maintains an office and place of business in Olathe, Kansas (Respondent's facility), has been engaged in the operation of a nursing home providing long-term care to the elderly. During the 12-month period preceding issuance of the complaint Respondent, in the course and conduct of those business operations, derived gross revenues in excess of $100,000, and, during the same period of time, Respondent purchased and received at its facility goods valued in excess of $5000 directly from suppliers located at points outside the State of Kansas. Therefore, Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it is a health care institution within the meaning of Section 2(14) of the Act. As further admitted by Respondent, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. The no-solicitation rule

Respondent purchased the nursing home about August 1, 1991, from Delmar Gardens Enterprises. Sandra Rekstad was hired as administrator on September 25, 1991. When Rekstad became administrator, she reissued on behalf of Respondent an employee handbook that had been previously used by Delmar Gardens. The handbook is 16 pages long. The first two pages contain statements captioned ''Welcome'' and ''Philosophy of Olathe Healthcare Center.'' The remaining pages contain a list of ''Personnel Policies'' which are numbered 1 through 46. The numbered policies include a listing of benefits and various employee conduct rules. Policy 30 states:

> Canvassing of any kind is prohibited. Any solicitation, poll, collections for any purpose, or the sale of tickets or merchandise must have the prior approval of the Administrator.

The complaint alleges that, by maintenance and discriminatory enforcement of this rule, Respondent has violated Section 8(a)(1).

Policy 38 of the handbook lists 25 separate disciplinary offenses which constitute ''grounds for discipline, suspension, and/or immediate discharge.'' The third offense is listed as:

> Soliciting Patients or Visitors—Attempting to sell anything or solicit donations from patients or visitors is prohibited at all times on facility premises. Solicitation of other employees is limited to non-patient areas during non-work time.

Respondent contends that, by concurrent maintenance of the last-quoted sentence in its set of disciplinary rules, any otherwise unlawful effect of its policy 30 has been nullified.

2. Initial union activity and petition date

Union Representative John Watson testified that he went to Respondent's parking lot on March 17, about 1 p.m. At the parking lot entrance Watson and some employees, including alleged discriminatee Birdsong, handed out authorization cards and other union literature to employees as they came to work or as they were leaving work. About 3:15 p.m., Watson went to the office area of Respondent's facility and asked to speak to the administrator. Watson was shown to the office of Rekstad where he met Rekstad and Neil Kjos, a management consultant for Respondent's parent corporation. On behalf of the Union, Watson requested recognition; Kjos declined. Watson testified that he left the premises ''a little bit after 3:30.''

Watson then went to the local office of the Board. Watson gave to a Board agent the authorization cards that he had secured from some of Respondent's employees and further gave the agent information necessary for the filing of a petition for a Board election. Watson acknowledged that ''the office was closing'' by the time that the petition was completed. The petition was not date-stamped until the next day, March 18.

As noted, one objection to the May 5 election is to the issuance of a warning notice to Birdsong on March 17. Another objection is to the posting of a no-distribution rule, either on March 17 or 18. Under *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961), to be considered as a valid basis for objection to a Board election, the conduct in question must occur after a petition is filed and before the election. On brief, the Union does not argue that the discipline of Birdsong occurred after the petition was filed. Because the Union does not so argue, and because it is clear from Watson's testimony that the Board office had closed on March 17 by the time the instant petition had been completed, I find that the discipline of Birdsong, as discussed infra, occurred before the petition was filed and therefore cannot be considered as a ground for an objection to conduct affecting result of the May 5 election, and I shall recommend that the objection be dismissed. Whether the no-distribution rule was posted during the critical period is a factual issue to be discussed infra.

3. Birdsong's warning notice

Birdsong, a nurse's aide, testified that she assisted Watson in distributing union authorization cards and literature to employees between 1 and 3 p.m. on March 17. Birdsong testified that, when so assisting Watson, she stationed herself 100 feet from the building, at a parking entrance, in plain view of anyone who might look out the windows of Respondent's facility. (Birdsong also testified that two persons, a ''Bryan'' and a ''Neal'' were maintenance supervisors and she saw them watching her as she distributed union literature on March 17. There was no further identification of Bryan or Neal, and there was no allegation or stipulation that any such persons were supervisors within Sec. 2(11) of the Act.)

Debbie Greenley is Respondent's director of nursing; she reports directly to Rekstad. Greenley did not testify. Birdsong testified that she punched in at 3 p.m. and got to her workstation on the nursing floor about 3:30 p.m. At that point Greenley approached Birdsong and asked Birdsong to step into an office area on the nursing floor. When the two women reached the office, Greenley presented a ''Disciplinary Action Form'' to Birdsong. The form is dated March 17 and, where the form calls for ''Statement of the Problem'' Greenley had written:

> Two incidents of residents (two separate residents) on north side complained that Dawn spoke ''abruptly'' and ''in a harsh tone,'' to them when asking for assistance—such as—''I'm not going to help you''—''you can help yourself.'' One report that a resident was left sitting on toilet seat in bathroom for 30–45 minutes before returning to assist them. This is inappropriate nursing practice and can be considered abuse/neglect.

In a blank for ''Recommendations'' Greenley had written ''any further reports of this nature can & will result in further discipline.'' In a blank for ''Consequence If Not Resolved'' Greenley had written ''possible discharge.''

Birdsong testified she asked Greenley what the warning notice was in reference to; according to Birdsong:

> Debbie Greenley said that she had been investigating the situation for a couple of weeks. That's why she had not notified me of the write-up before that day, and I asked her, well who it involved and what they said and when it was supposed to have happened. . . . [Greenley] said that she couldn't give me that information for fear that it might put the resident in jeopardy.

Birdsong testified that she told Greenley that she had never done anything like the conduct described in the warning notice. (Birdsong wrote a similar statement on the back of the warning notice when she signed the notice to acknowledge receipt.)

At trial Birdsong again denied, credibly, any conduct such as that described in the warning notice. Respondent did not present Greenley and offered no explanation why it did not do so. Respondent did call Rekstad who testified that Greenley told her (Rekstad) that she (Greenley) had received anonymous complaints, not from patients, but from persons purporting to be relatives of patients. Further according to Rekstad, the anonymous complainants did not name Birdsong, but, again according to Rekstad, Greenley told Rekstad that, somehow, Greenley had figured out that Birdsong was the individual to whom the anonymous complainants had referred.

Rekstad testified that on the basis of Greenley's report to her, she authorized the above-quoted warning notice that Greenley had drafted.

Rekstad denied that, at the time she authorized the warning notice on March 17, she knew that Birdsong had joined Union Representative Watson in the parking lot distribution of literature on the same day. Rekstad testified that she knew of such distributions, but she denied knowing the identity of any employees who were involved. (Rekstad did not testify that she authorized the above-quoted warning notice before learning that the March 17 distributions had occurred.)

4. The no-distribution rule

On March 17 Rekstad issued a one-page letter to all employees. The letter begins with a statement that: ''Olathe Healthcare is absolutely opposed to have [sic] a union represent any portion of our work force.'' The letter concludes:

''Don't jeopardize our success with the possibility of business disruption, inefficiencies or discord among the employees and with management. In the long run that will hurt us all. You control our future!''

At some point on March 17 or 18, Rekstad posted at the facility copies of the following:

NOTICE

SOLICITATION FOR ANY PURPOSE IS NOT TO OCCUR DURING WORKING TIME. DISTRIBUTION OF LITERATURE OF ANY KIND IS NOT PERMITTED AT ANY TIME ON COMPANY PREMISES.

Rekstad testified that she posted this notice before Watson's 3:15 p.m., March 17 demand for recognition. Rekstad further testified that she posted the notice because some employees had complained to her that other employees who were distributing union authorization cards had interfered with them as they attempted to do their work on that date. The notice remained posted through the May 5 election.

Penny Clay and Linda Sue Hayman are currently employed as nurse's aides at Respondent's facility. Both Clay and Hayman testified that they did not see the above notice before they reported to work on March 18.

I credit Rekstad's testimony that she posted the rule before Watson's 3:15 p.m., March 17 demand for recognition because I believe that Rekstad knew immediately of the parking lot distributions that began at 1 p.m.; and I believe that Rekstad reacted immediately by posting the no-distribution rule in question. Accordingly, I shall recommend that the objection to the May 5 election, based on the promulgation of the no-distribution rule, be dismissed because the promulgation of the rule occurred before the March 18 petition for election was filed. See *Ideal Electric*, supra.

Both Clay and Hayman further testified, without contradiction, that both before and after the posting of the March 17 no-distribution rule, employees and supervisors (including admitted Supervisor De Rhonda Rinas, assistant director of nursing) sold cookies and cosmetics and other such items at or around the nurses' stations, undisputed work areas. Both Clay and Hayman credibly testified that such solicitations and distributions had continued until approximately a week before the hearing.

Except for the case of Birdsong, there is no evidence that any employee who attempted to solicit for the Union, or distribute literature for the Union, was disciplined for such conduct after the posting of the March 17 notice.

5. Election observer objection

At the May 5 election, the Employer used Carla Breitling as its observer. Breitling was hired in September 1991, or about 8 months before the election. She first worked alternate weekends, then daily, as a receptionist. On April 17 she was reclassified as ''staffing coordinator.'' She had quit her employment by the time of the hearing. The Union contends that the Employer's use of Breitling as an election observer was objectionable because, as staffing coordinator, Breitling was either a supervisor within Section 2(11) of the Act or she was an individual who was ''closely aligned with management.''

Breitling testified that, when she was staffing coordinator, the director of nursing would usually create a monthly master schedule stating which personnel (including supervisors) would be working during the coming month and what shifts that personnel would work. Using the master schedule, Breitling would create daily schedules which were posted for the employees. The hospital is divided into seven working areas. For each shift, in each area, the hospital is staffed by a nurse/supervisor and three or four nurse's aides. The master schedule created by the director of nursing does not indicate where an employee, or supervisor, would work during the month; however, that information is listed on the daily schedules that Breitling would complete. Breitling testified that she used previous schedules and some handwritten notes from the director of nursing to indicate on the daily schedules where personnel would be working. Breitling has no nursing experience and there is no evidence that any degree of discretion was required in her entering on the daily schedules the places where the employees (and supervisors) were to work.

Breitling testified that sometimes the monthly schedules that were issued by the director of nursing did not include sufficient staffing for the nursing areas for each day of the coming month. Also, employees would occasionally report off for work unexpectedly. In either event, when she was staffing coordinator, Breitling had the duty of calling employee after employee until all the staffing slots were filled. Breitling testified that she made her telephone calls alphabetically according to lists of employees who had previously shown a willingness to work additional shifts or hours. Breitling testified, without contradiction, that employees who called in to report prospective absences were also required to call to report to the director of nursing. In the 3-week period before the election that Breitling was the staffing coordinator, she was paid hourly and received the same benefits as other hourly employees. She had no office, but worked where she could find space. She attended no supervisory meetings, and there is no evidence that she campaigned on behalf of management (or the Union) during the election. Breitling worked 9 a.m. to 5:30 p.m., Mondays through Fridays; she received a 1/2-hour paid lunchbreak; and she punched the same timeclock that other employees punched. When Breitling was promoted from receptionist to staffing coordinator, her wages were raised from $6.95 to $8 per hour.

Employees Birdsong, Clay, and Hayman testified that they called Breitling to report absences, but there is no probative evidence that Breitling used any discretion in granting time off to any employees.

Employee Hayman testified that at the May 5 election ''ten to eleven'' employees approached the polling area and then turned around and left.

B. *Analysis and Conclusions*

1. Election observer objection

There is no evidence that Breitling was a statutory supervisor at the time of the May 5 election. The Union contends, alternatively, that Respondent's use of Breitling as an election observer was objectionable because Breitling held a position that was ''closely aligned with management,'' under *Mid-Continent Spring Co*., 273 NLRB 884 (1985), and *Sunward Materials*, 304 NLRB 781 (1991). In *Mid-Continent*,

the individual selected by management was the personnel manager, unquestionably a management position. In *Sunward Materials*, the individual selected by management as its observer was its training administrator and, as such, was directly involved in the hiring and review processes of employees. Moreover, the training administrator in *Sunward Materials* appeared at antiunion campaign meetings that were conducted by management, and he stationed himself with management personnel as antiunion messages were being delivered. Therefore, the cases cited by the Union are distinguishable. Moreover, that one employee saw other employees turn away from the polling area is not evidence that those other employees were, in fact, discouraged from voting by the presence of Breitling. Accordingly, I shall recommend dismissal of this objection to the election.

2. The disciplinary rules

The complaint, paragraph 5, alleges Respondent's policy 30 is an unlawful no-solicitation rule and that by maintaining and enforcing its policy 30, Respondent has violated Section 8(a)(1) of the Act.

Policy 30 is not limited to solicitations conducted on working time; it would cover nonworking time also, and, it is therefore presumptively invalid. *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962).

Respondent contends that policy 38 somehow cures any unlawfulness of policy 30 because policy 38 states that solicitations are to be conducted in nonpatient areas, during nonworking time. Policy 38, at most, indicates where approved solicitations may be conducted; it does not remove, in any way, the requirement for prior management approval as stated in policy 30. Respondent further contends that the policy 30 was never enforced. This is not true. The discipline of Birdsong, as discussed infra, was, in effect, an enforcement of policy 30. Also, the Board stated in *J.C. Penney Co*., 266 NLRB 1223 at 1224–1225 (1983):

> Moreover, with regard to Respondent's assertion in its brief that the rule never was enforced, we note that it is well established that the mere maintenance of such a rule serves to inhibit employees from engaging in otherwise protected organizational activity, and, therefore, the absence of evidence of enforcement of a rule does not preclude the finding of a violation or the issuance of a remedial order.

Respondent's maintenance and enforcement of policy 30 violated Section 8(a)(1), as I find and conclude.

In response to the union activity that began on March 17, Rekstad posted at the facility a notice that stated, ''Distribution of literature of any kind is not permitted at any time on company premises.'' Respondent cites several cases to the effect that an employer, when faced with interference with production caused by employees engaging in solicitations or distributions, may post valid no-solicitations or valid no-distributions rules. However, the quoted no-distribution rule is unlawfully broad, as it is not limited to working areas or immediate patient care areas. Accordingly, by posting of the unlawfully broad no-distribution rule on March 17, Respondent violated Section 8(a)(1) of the Act, as I find and conclude.

3. Warning notice to Birdsong

Birdsong and others were engaging in open and obvious union activities on March 17 at the entrance to the Respondent's parking lot. Rekstad admitted that these activities were reported to her, but denied learning the identities of the employees who were engaging in such activity. This denial is too much to believe, and I do not. The activity prompted a full-page warning to the employees stating that Respondent was ''absolutely opposed to having a Union.'' The notice further cautioned the employees in most dire terms, stating, that union activity, ''will hurt us all.'' Following that, Respondent posted a blatantly violative no-distribution rule to supplement the violative no-solicitation rule that was then contained in its employee handbook. Finally, the timing of Respondent's action, as it was directed towards Birdsong, demonstrates unlawful motivation; immediately after Birdsong engaged in open and obvious union activities, she was given a warning notice for something that had happened as much as 2 weeks before the fact. Respondent has suggested no legitimate reason for this delay.

Accordingly, I find that the General Counsel has presented a prima facie case that Birdsong was given a violative warning notice for engaging in union activity. Under *Wright Line*, 251 NLRB 1083 (1980), Respondent must show that it would have issued Birdsong the warning notice absent her protected union activities.

Respondent presented no evidence that Birdsong engaged in any misconduct. Moreover, Birdsong credibly denied having engaged in the misconduct attributed to her in the warning notice of March 17. Respondent cites cases to the effect that an employer cannot be held to have violated Section 8(a)(3) if a supervisor who disciplines an employee, in good faith, believed that the employee had engaged in the conduct for which the employee was disciplined (and the discipline for such conduct was meted out on a nondiscriminatory basis). In the cases cited by Respondent, however, the employers produced at trial more evidence than bare reports of misconduct and bare testimony that the reports were relied on. In each case cited by Respondent, someone, either the supervisor who disciplined the alleged discriminatee[2] or someone who made a report to the supervisor,[3] testified that the alleged discriminatee did something which could, in good faith, be interpreted as the proper subject of discipline. Here, there was no such testimony; Respondent did not produce anyone who might have been able to testify that Birdsong engaged in any conduct that might have, in good faith, been intrepreted by management as misconduct. (Respondent did not even produce Greenley who could not have testified about Birdsong's conduct, but could only have testified that she decided that Birdsong had engaged in certain conduct and that she reported her conclusions to Rekstad.)

Therefore, because the General Counsel has presented a prima facie case that Birdsong's March 17 warning notice was issued because of her union activities, and because Respondent has failed to show that it would have issued that warning notice even absent Birdsong's protected activities, I find and conclude that the issuance of the warning notice violated Section 8(a)(3) of the Act, as alleged. I further find

[2] *Lucky Stores*, 269 NLRB 942 (1984); *McDonald Land & Mining Co*., 301 NLRB 463 (1991).

[3] *GHR Energy Corp*., 294 NLRB 1011 (1989).

that the issuance of the March 17 warning notice to Birdsong constituted discriminatory enforcement of the no-distribution rule that Respondent posted that date because, as is uncontested, Respondent has continued to allow other distributions (and solicitations) at the facility.

CONCLUSIONS OF LAW

1. By maintaining and enforcing an unlawfully broad no-solicitation rule, and by promulgating, maintaining, and enforcing an unlawfully broad no-distribution rule, Respondent has violated Section 8(a)(1) of the Act.

2. By issuing, on March 17, 1992, to employee Dawn Birdsong a written warning notice because she had become or remained a member of the Union or had given assistance or support to it, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Objections to the Election

I find that the objections based on Respondent's maintenance of unlawfully broad no-solicitation and no-distribution rules during the period between the filing of the petition on March 18 and the election of May 5 are valid because such conduct reasonably would have interfered with the free choice of the employees, and I conclude that the election held May 5 must be set aside and that a new election be held at such time as the effects of the unfair labor practices found herein are dissipated to the extent that a free and fair election may be held.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Olathe Healthcare Center, Inc., Olathe, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warning notices to employees because they have become or remained members of Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local No. 2, or because they have given assistance or support to that labor organization.

(b) Promulgating, maintaining in effect, or enforcing unlawfully broad no-solicitation or no-distribution rules.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful written warning notice issued on March 17, 1992, to Dawn Birdsong and notify her, in writing, that has been done and that the warning will not be used against her in any way.

(b) Post at its place of business in Olathe, Kansas, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by Respondent's authorized representative shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election held on May 5, 1992, in Case 17–RC–10769 be, and it hereby is, set aside, and that the case be severed from Case 17–CA–16148 and remanded to the Regional Director for Region 17 of the Board for the purpose of conducting a new election at such time as he or she deems the circumstances permit the free choice of a bargaining representative.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue warning notices to you because you become or remain members of Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local No. 2, or because you have given aid or support to that labor organization.

WE WILL NOT promulgate, maintain, or enforce any rule, regulation, or other prohibition that forbids solicitation or distribution of literature, on behalf of a union by our employees, during their nonworking time in nonworking areas or other areas where such conduct would not adversely affect patient care.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any reference to the unlawful written warning notice that we issued to Dawn Birdsong on March 17, 1992, and WE WILL notify her in writing that this has been and that the warning notice will not be used against her in any way.

OLATHE HEALTHCARE CENTER, INC.